SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 5 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term 1967

No. 597

UNITED STATES OF AMERICA,
Appellant

v.

UNITED SHOE MACHINERY CORPORATION

DEFENDANT'S MOTION TO DISMISS OR AFFIRM

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October 4 1967

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DEFENDANT'S MOTION TO DISMISS OR AFFIRM

United Shoe Machinery Corporation, defendant below, hereby moves pursuant to Rule 16—

(1) to dismiss the appeal on the ground that it is not within the jurisdiction of this Court because not taken in conformity to statute;

(2) in the alternative if jurisdiction exists, to affirm the judgment of the District Court on the ground that the questions presented by the appeal are so unsubstantial as not to need further argument.

Opinions Below

The opinions below are reported in 266 F. Supp. 328 (1967) and in 110 F. Supp. 295 (1953), aff'd 347 US 521.

Jurisdiction

Jurisdiction of this Court is invoked under the Expediting Act of February 11 1903 § 2, 32 Stat. 823 as amended 15 USC § 29. Notice of appeal was filed June 9 1967,

but the essential underlying question was determined by the District Court February 18 1953 (110 F. Supp. 295) and the order of April 11 1967, in so far as appealed from, was merely a reconsideration of the 1953 decision.

Statutes Involved

(a) As to jurisdiction, 15 USC § 29 provides:

> "In every civil action brought in any district court of the United States under any of said Acts [the antitrust acts], wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court."

28 USC § 2101 subsection (b) provides:

> "(b) Any other [*i.e.*, other than one involving constitutionality of an Act of Congress] direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceedings, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final."

(b) The provisions of the Sherman Act, 26 Stat. 209 as amended, 15 USC § § 2 and 4, which are invoked by appellant, are set forth in the Jurisdictional Statement at p. 3.

Issues Presented by These Motions

Stated in their simplest form, the issues are whether a decree entered by a district court in 1953 which found monopolization but denied the Government's prayer for divestiture or dissolution, is subject to appeal in 1967 upon

the court's reiterated denial of divestiture after a further review held to show the effective working of the decree in the manner originally contemplated; and whether such an appeal, even if proper and timely, presents questions substantial enough to need further argument and consideration by this Court.

Facts Material To Motions

The Government in 1947 brought a civil action against United Shoe Machinery Corporation pursuant to Sherman Act § 4 to restrain alleged violations of Sections 1 and 2. The complaint charged in principal part monopolization of the domestic shoe machinery industry and of manufacture and distribution of certain shoe factory supplies. The trial was a very long one and the record voluminous.[1]

The decree, filed February 18 1953 (110 F. Supp. at 351-4, subsequently modified in respects not here material), found a violation of Sherman Act § 2 by monopolization of the shoe machinery trade and commerce among the several states, and also by monopolization of that part thereof in tacks, nails, eyelets, etc. which is concerned with supplying those products to domestic shoe factories. It dismissed with prejudice the other charges of Sherman Act violation. In addition to enjoining a continuation of the violations found, the decree set forth in numbered paragraphs 5-17 and 20-2 detailed provisions for the future conduct of defendant's business, with the object, as expressed by the trial court, "to extirpate practices that have caused or may hereafter

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[1]The trial court noted the 121 days of hearings, the 14,194 pages of transcript, the 5,512 exhibits totaling 26,474 pages, the 47 depositions covering 2,122 pages, the briefs on trial aggregating 1,893 pages on the two sides, and the requests of both sides aggregating 1,166 pages. 110 F. Supp. at 299; cf. Government Brief in No. 394 October Term 1953 pp. 4-5.

cause monopolization, and to restore workable competition in the market" (110 F. Supp. at 347). The court's opinion on remedy, in explaining the clauses of the decree, placed foremost in the discussion its rejection of the remedy of dissolution which Government counsel had proposed (110 F. Supp. at 348).

From the 1953 decree defendant appealed to this Court but the Government did not. Briefs of the parties here comprised 358 pages for defendant-appellant and 187 pages for the Government; of these appellant devoted 53 pages, and the Government 33 pages, to the remedial clauses of the decree. The Government brief contended that "The provisions for relief are appropriate and necessary" and emphasized "the careful consideration which underlies the provisions for relief" and "the logic, the clarity and the meticulousness of the opinion on remedy, and of the decree itself" (Govt. Br. in No. 394 October Term 1953 pp. 154, 156).

Neither brief in No. 394 discussed the trial court's denial of the Government prayer for dissolution, detailed findings on which occupy four paragraphs of the opinion in 110 F. Supp. at 348.[2] On the appeal, this Court affirmed on May 17 1954 with the following opinion *per curiam* (347 US 521):

> "The case having been fully argued and the Court being satisfied that the findings are justified by the evidence and support the decree, the judgment is affirmed."

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[2]By a surprising departure from the strong plea for dissolution made to the District Court in 1952 (p. 8 below), the Government now says that "There was no sound reason" for the Government to have challenged the adequacy of the 1953 decree on appeal and that the Government "might well itself have appealed on the adequacy of relief" if it had known in 1953 that par. 18 of the decree would be construed by the court as it now has been (Jurisd. St. pp. 13, 14).

Par. 18 of the decree directed a report to be made by both parties as to its effect, at the end of a ten-year period defined as C Day, viz. January 1 1965. This paragraph was carefully constructed to differentiate between a review of the working of the decree on the one hand, and on the other possible petitions for modification. It provided (110 F. Supp. at 344):

> "18. On C Day, both parties shall report to this Court the effect of this decree, and may then petition for its modification, in view of its effect in establishing workable competition. If either party takes advantage of this paragraph by filing a petition, each such petition shall be accompanied by affidavits setting forth the then structure of the shoe machinery market and defendant's power within that market."

Both parties did as of January 1 1965 file written reports on the effect of the decree, and each petitioned for its modification. Defendant sought a relaxation of the decree and elimination of many restrictions imposed by it. The Government requested findings that workable competition had not been established by the decree and moved to reinstate in slightly different form the prayer for relief that had been denied in 1953.[3]

The trial court on April 11 1967 denied both petitions, 266 F. Supp. 328. This decision was rendered after proceedings on 14 trial days ending November 4 1966, which followed a pre-trial order made July 19 1965, a number of pre-trial hearings, and extensive conferences and stipulations between counsel relative to the basic facts. While the

[3]This petition, dated December 29 1964, sought a requirement that defendant "submit to the Court a plan, pursuant to which the defendant shall establish an independent, full-line shoe machinery manufacturing company capable of competing with the defendant in the shoe machinery market." This meant dissolution (as to the shoe machinery business) into two parts instead of the three proposed in 1953.

pre-trial order regulated the issues to be considered at the hearings, it made provision for additional matters to be considered "after a specific preliminary finding that such an excursion is necessary to achieve justice"; and the Government did avail itself of this exception and obtained an amendment of the pre-trial order in at least one instance (revenues as a measure of market share [Tr. 350-1]; see Jurisd. St. p. 10 fn. 9).

The hearings were conducted and the opinion and order now complained of were made by the same trial judge, Wyzanski C. J., whose original provisions in the decree had drawn the Government's approval for their logic, clarity and meticulousness (p. 4 above). Conceded by appellant to be a master of the subject-matter, Judge Wyzanski devoted the bulk of his opinion and findings to the Government's renewed demand for the dissolution denied in 1953 (266 F. Supp. at 330-4; Jurisd. St. App. A pp. 28-37). He reiterated on the facts as up-dated by the 1966 hearing the conclusion he reached in 1953 against dissolution or divestiture. Upon the basis of a comparison of what the court knew in 1953 with the more recent evidence summarized by him in 16 carefully formulated findings, the trial judge held that "nothing new, aside from the updating of the data, is involved"; that, while it may have been an error in 1953 not to have dissolved United, the choice of remedy (affirmed by this Court in 1954) was made in 1953 for reasons explained in his opinion and findings at the time; and that the Government's petition was, in short, that the decree be reversed because the trial court erred in 1953.

This appeal thus embraces essentially the same question —that is, refusal to direct divestiture upon a finding of monopolization—which was tendered in its stark and simple form by the 1953 decision, with the difference only that the refusal is now reiterated upon a record far more favorable to the defendant.

I

THIS COURT LACKS JURISDICTION OF THE APPEAL.

The motion to dismiss must be granted because the appeal is clearly out of time by the statutory standards. The question presented by the notice of appeal was decided against the Government in the 1953 decree from which it elected not to appeal.

The matter was at that time aggressively advanced by the Government and squarely determined against it, on findings more favorable to the Government than the findings of 1967. In its brief on relief dated January 29 1952, after trial, the Government began with a general discussion of the three basic objectives of relief (pp. 2-5) and devoted ten pages to the specific need for "Relief by way of corporate dissolution" (pp. 36-46). It cited at the outset the authorities in this Court for opening up the market to competitors, for prevention in future of acts found to constitute monopolization, and for depriving a violator of the fruits or benefits of monopolistic practices. This last principle, the Government told the trial court (p. 3),

> ". . . lends additional support to the Government's request for the dissolution of United, the divestiture of United's assets in the shoe supplies field, and the compulsory furnishing of United's technology to all applicants."

There then followed a detailed discussion of various injunctive clauses requested. This led into the argument for corporate dissolution with the statement at p. 36:

> "Discussion of the need for dissolving United has been deferred to this position in the brief not

> by reason of any doubt of the imperative need of such relief, but so that this Court can appraise the net impact of the injunctive relief that has already been proposed before it considers whether relief by way of dissolution is necessary."

After citing authority on divestiture as a remedy, this brief came to the basic question before the District Court (p. 37):

> "The basic question is: Assuming the maximum theoretical effectiveness from all the items of injunctive relief that have thus far been suggested, will that serve to dislodge United's illegal monopoly?"

To this the Government brief gave an unqualified negative, urging that divestiture was necessary on top of the injunctive relief granted (pp. 37-8):

> "Our answer is that, although these measures will reduce some of United's trade-restraining potentialities, the basic monopoly of United will stand untouched and unimpaired. United towers over its rivals like a giant oak spreading its roots system throughout the entire field of shoe machinery and inevitably drawing into itself all the nourishment of the marketing and technological resources in that field. Unless United is cut down to scale, no competitive seedling or sapling will be able to take effective root in the shoe machinery field. As stated by Justice Cardozo '* * * size carried with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past.' *United States* v. *Swift & Co.*, 286 U. S. 106, 116. . . Even after the most refined and

well-articulated injunctive provisions have been included in this Court's judgment, customers for shoe machines will still turn to United rather than to any other source.

The futility of ordinary injunctive relief to break up the monopoly power possessed by United can be variously illustrated. . . ."

After ten pages of argument as to the necessity for and advisability of a dissolution of defendant, the Government brief of January 29 1952 summed up the point (p. 46):

"United's dissolution is a practical necessity for the emergence of competitive conditions in the shoe machinery industry. Dissolution can be accomplished, without undue hardship or dislocation. Even were hardship involved, however, such hardship would be a necessary and unavoidable consequence of terminating an illegal condition. See *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 189; *United States* v. *Union Pacific Railroad Co.*, 226 U. S. 470, 477."

This considered and insistent demand for dissolution or divestiture was entertained and flatly rejected in 1953, by the decision which this Court affirmed in 347 US 521. On his summary of the evidence Judge Wyzanski found that the tests of monopolization laid down in *United States* v. *Griffith* 334 US 100 and *United States* v. *Aluminum Company of America* 148 F. 2d 416, approved in *American Tobacco Co.* v. *United States* 328 US 781 (110 F. Supp. at 343) had been satisfied. He held the corrective decree must be framed upon the basis of the presuppositions underlying *Aluminum* and *Griffith* (p. 347). In an elaborate con-

sideration of the philosophy of cure, the trial judge pointed to the history of the Standard Oil, American Tobacco and Alcoa cases and concluded that courts would not retain their authority in the antitrust field if they

> "... were in the habit of proceeding with the surgical ruthlessness that might commend itself to those seeking absolute assurance that there will be workable competition, and to those aiming at immediate realization of the social, political, and economic advantages of dispersal of power.
>
> Such self-restraining considerations have peculiar force in this case. Until Alcoa lost its case in 1945, there was no significant reason to suppose that United's conduct violated § 2 of the Sherman Act. The Supreme Court had three times, in *United States* v. *Winslow*, 227 U. S. 202, *United States* v. *United Shoe Machinery Company of N. J.*, 247 U. S. 32, and *United Shoe Machinery Corp.* v. *United States*, 258 U. S. 451, reviewed aspects of this company's, or its predecessor's activities. What United is now doing is similar to what it was then doing, but the activities which were similar stood uncondemned,—indeed, one ought to go further and say they were in part endorsed. In the face of these decisions, it would be anomalous to charge the officers of United with any moral deficiency." (110 F. Supp. at 348)

On this foundation, the trial court in 1953 considered the four principal problems respecting a proposed decree, and began with the proposal for dissolution. To this remedy Judge Wyzanski devoted four paragraphs in his discussion and concluded (p. 348):

> "On the whole, therefore, the suggested remedy of dissolution is rejected."

The question of dissolution so decided in 1953, was decided with finality. The appeal taken by defendant at that time would have been impossible if that were not so because, as Judge Wyzanski points out, if par. 18 of that decree gave the court the power to alter it on a lesser showing than grievous wrong evoked by new conditions, the decree would not have been final and appealable to this Court (266 F. Supp. at 330; Jurisd. St. App. A p. 27). There is no reason the Government could not have appealed. In fact its view as to remedy, so positively expressed in the District Court, required it to appeal if it desired to maintain the claim of dissolution.

The court's statement in 266 F. Supp. at 330 of the facts it knew in 1953, compared with the new findings held to justify the denial of the Government's present petition (266 F. Supp. at 331-4; Jurisd. St. App. A pp. 29-36) establishes beyond any possibility of doubt that the question now tendered by the Government is the identical question decided against it in 1953, with respect to which it waived appeal. The Jurisdictional Statement does not and cannot controvert the finding of the trial court (266 F. Supp. at 330; Jurisd. St. App. A pp. 28-9):

> "In short, this Court was quite cognizant of the fact that permitting United to continue as a single enterprise engaged predominantly in leasing rather than selling made it almost certain that at the end of a decade, absent a strong outside challenger, United's market power would be merely diminished not destroyed.
>
> Yet this Court chose not to dissolve United, and not to prohibit leasing, but merely to purge the leases of certain specific restrictive clauses, to require United to offer lessees the alternative of purchasing, and to require United to take certain miscellaneous

steps which need not now be recited. Among the reasons that this Court made this choice were that the Supreme Court had approved the constitution of United as a single enterprise, that it had permitted United to proceed with leasing as an exclusive method of distributing machines, that United had engaged in no predatory or immoral practices, and that United owed much of its position to superior products and services, to its own inventions, and to other results of United's skill, ability, and efficiency."

Nor can appellant gainsay the concluding remarks of Judge Wyzanski (266 F. Supp. at 334; Jurisd. St. App. A pp. 37-8):

"While this Court now has before it the facts of the decade 1954-1963 which were not known in 1953, nothing new, aside from the updating of the data, is involved. . . .

It may have been an error in 1953 not to have dissolved United rather than to allow sectors of its power to be dissipated by small competitors, and to leave other sectors of power to be effectively attacked only when a small competitor became large or a large competitor appeared. But the choice was made in 1953 for reasons already adequately explained.

What the Government is complaining of is not that the decree did not work as expected, but that working in the foreseeable and intended way the decree did not accomplish what the Government had originally prayed for and what this Court had rejected. In short, the Government petitions that the decree be reversed because this Court erred in 1953."

Against an appeal so tardily taken from a decision so long accepted, the jurisdictional bar set up by Congress is insuperable. It cannot avail appellant to set up the ten-year review provided by par. 18 and to urge that the Government "might well itself have appealed on the adequacy of relief" had it known in 1953 that par. 18 would be construed as it is now construed (Jurisd. St. p. 14). Under the strict measure of the Expediting Act the Government was surely not entitled to rely on the *assumption* that relief then denied would be granted ten years later.[4]

United States v. *Swift & Co.* 286 US 106, which the District Court followed, was known to the Government in 1953, and indeed represented the Government's success in preventing the relaxation of an antitrust decree at the suit of defendant. But whether or not the rule of that case should be applied unequally as between a Government application and a private application for subsequent modification of an antitrust decree,[5] the determination by the District Court in this instance that the position of gradual amelioration now existing is that which he foresaw and that the decree is working as intended, is conclusive. It is this cardinal feature of the case which must on jurisdictional grounds defeat this appeal deliberately postponed beyond the statutory limit (cf. Jurisd. St. pp. 13-4).

Brown Shoe Co. v. *United States* 370 US 294 (1962) impliedly decides the question here by holding that a decree

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[4]The Government citation of *Associated Press* v. *United States*, 326 US 1, 22-3 (Jurisd. St. pp. 13-4) does not assist its argument, because there the Government *did* appeal from the original decree. Particularly in view of the limitations of the controversy carried up on that appeal through the summary judgment (326 US at 5, 22), the statement of the Court cannot be taken as an invitation to a defeated party to postpone its appeal in the hope of some modification in future.

[5]The contention (Jurisd. St. pp. 15-7) that the Government is entitled to a discriminatory preference runs counter to *United States* v. *International Harvester Co.* 274 US 693, 702-3, 707.

of the trial court directing divestiture, even without the filing of the actual plan of divestiture, is final for the purposes of the Expediting Act (p. 305). The Court at pp. 306-11 devoted careful consideration to the indicia of finality under the Expediting Act, and took jurisdiction of the divestiture point with the statement that "Every prayer for relief was passed upon."

By exact parity of reasoning, the rejection by the trial court here of dissolution in 1953, bars the Government from again raising it through the piecemeal review here attempted. The question is foreclosed now because it was ripe for review in 1953 (370 US at 309). Congressional policy against piecemeal litigation forbids the sending up of a case in fragments. *Catlin* v. *United States* 324 US 229, 233-4.

In another aspect the order of April 11 1967 lacks the finality necessary for appeal because it merely re-affirms the 1953 decision on what was essentially a petition for rehearing and reversal of that decision. See *Conboy* v. *First National Bank* 203 US 141; cf. *Loeber* v. *Schroeder* 149 US 580; Note, "Appealability in the Federal Courts" 75 Harvard Law Review 351, 357.

II

THE QUESTIONS NOW TENDERED BY THE GOVERNMENT ARE SO UNSUBSTANTIAL AS NOT TO MERIT FURTHER ARGUMENT.

If this Court has jurisdiction of the appeal, it should affirm summarily for lack of any substantial question.

The question tendered by the appeal, according to the Jurisdictional Statement pp. 2-3, is whether the decision of the District Court, in denying a divestiture sought and denied 14 years earlier, "was based upon an erroneous standard for determining when the government is entitled

to further relief in Sherman Act cases, particularly since the original decree specifically contemplated future judicial consideration of its effectiveness". As we have shown (pp. 7-12 above), this is not the real issue raised on this record, in that the Government really seeks to resurrect a contention long ago denied and abandoned without appeal. Even in the light in which the Jurisdictional Statement tries to put it, however, the point brought up by the appeal does not deserve review.

(a) As a matter of substance the review sought by the Government would involve only a question of degree; that is, whether a process which has in ten years reduced defendant's market occupancy from 85% to 62% (266 F. Supp. at 331; Jurisd. St. App. A pp. 29-31), *and which is a continuing process,* is moving satisfactorily toward pure competition. This substantial diminution was accompanied by entries of competition which were substantial both by numbers of companies and by volume of offerings. We need merely refer to the painstaking and detailed findings of the 1967 decision (266 F. Supp. at 331-4; Jurisd. St. App. A pp. 29-36), which are inadequately summarized in the Jurisdictional Statement itself, to make the point that a trial court of unrivaled expertness and familiarity with the vast record of a complex subject-matter has determined the 1953 decree to have worked effectively and to have worked as intended.

The bland observation that "The public is entitled to the restoration of competition . . ." (Jurisd. St. p. 21) disregards both the explicit findings as to competition and the expressed satisfaction of the shoe manufacturers with the present workings of the decree (266 F. Supp. at 335; Jurisd. St. App. A p. 38). The Court explicitly noted that they are among the chief intended beneficiaries of the decree and they have had an unequalled opportunity daily to observe its effects in the last decade (*ibid.*).

The Jurisdictional Statement overlooks the fact that all the leasing and related practices condemned by the 1953 decree have been extirpated The original decree has been fully executed. It was on these alone that the original judgment of monopolization was founded, all other charges in the case having been dismissed with prejudice (p. 3 above). Hence the assertion in the Jurisdictional Statement that "United continues to enjoy a monopoly or near-monopoly position" (p. 18) is gratuitous and unfounded. The assertion by footnote that United's compliance with the decree lacks support in the record (Jurisd. St. p. 20) is contrary to fact: not only did United's report and the 14 days of testimony establish complete observance by United of the decree, but Government counsel, when questioned by the court whether any claim was made of violation by the defendant, replied in the negative (Tr. 231, 561-2, 583, 588-9).[6]

Emphasizing the insubstantiality of the matters tendered by this appeal is the acknowledged rule that the District Court has wide discretion and flexibility

> ". . . in molding the decree to the exigencies of the particular case. E.g., *United States* v. *Crescent Amusement Co.*, 323 U. S. 173; *International Salt Co.* v. *United States*, 332 U. S. 392."[7]

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[6]Other assertions in Fn. 13 (Jurisd. St. pp. 19-20) critical of the trial court's findings are not only further illustrations of the proposition that the present appeal centers on questions of measurement; but are in themselves erroneous. Thus the statement that "there was no evidence before the court regarding rates of return in other industries", overlooks the fact that the original voluminous record had such evidence in the testimony of Joel Dean and related exhibits (R. pp. 13010-13019 in No. 394 October Term 1953).

[7]This language comes from the Government's brief in this Court in No. 394 October Term 1953 at p. 159.

See also *Associated Press* v. *United States* 326 US 1, 22; *Timken Roller Bearing Co.* v. *United States* 341 US 593, 600-1; *Lorain Journal Co.* v. *United States* 342 US 143, 156.

(b) To the contrary of the contentions in the Jurisdictional Statement, the record made on the ten-year review by the District Court shows exact and full performance of the remedial measures directed to the only violations of the antitrust laws which that court found, and requiring elimination of the restrictive features of the leases, establishment of alternative sale provisions, and the like. The trial court's original determination that only the lease practices so corrected were defendant's offenses against the law as remodeled by the Alcoa and American Tobacco decisions (110 F. Supp. at 343-5) has been adopted by this Court's affirmance in 347 US 521, with its declaration that the findings were justified by the evidence and supported the decree. The standard for adequate relief of *United States* v. *Grinnell Corp.* 384 US 563, 577 (Jurisd. St. p. 13), is satisfied; the monopoly power as found by the District Court and by this Court has been dissipated.

(c) The suggestion in the Jurisdictional Statement that the District Court's application of the rule of *Swift & Co.* v. *United States* might impair effective enforcement of the antitrust laws (Jurisd. St. pp. 15-7) is quite unreal. The *Swift* case, as Judge Wyzanski remarked (266 F. Supp. at 330), has been followed consistently; and the standards laid down thereby, whether for a consent decree or for one entered (as this one was) at the end of strenuous litigation, are essential to the finality on which the right of appeal itself is founded. Par. 18 of the decree could not have changed that rule because, as the District Court itself pointed out, the effect would have been to render the 1953 decree non-final and non-appealable (266 F. Supp. at 330).

The Government tries to draw a highly semantic difference between past and present participles in par. 18 of the decree: that is, it contends that par. 18 contemplated that workable competition would have been established by 1965, whereas the standard now applied is how successful the decree has been in gradually eroding United's 1953 power to monopolize (Jurisd. St. p. 14). Here again the Government overlooks the fact that the decree has now completely destroyed the power to monopolize, as isolated and determined by the court in 1953 (p. 16 above). But as to the statement that, if the Government had understood the Court's present interpretation of the decree to be that which would be applied, "it might well itself have appealed on the adequacy of relief . . ." (Jurisd. St. p. 14), it clearly is mistaken. At least two of the attorneys who have signed the Jurisdictional Statement here also signed the brief in this Court in No. 394 October Term 1953, and presumably realized that the trial court had denied the claimed dissolution which they in 1953 considered an indispensable concomitant of the injunctive relief (p. 8 above). This Court's exercise of appellate jurisdiction cannot depend upon the subjective interpretation earlier placed upon decretal words by one of the parties. Moreover the distinction whether in 1953 the trial court intended its 1965 review to test a state of competition rather than a process of change is a most unsatisfactory basis for plenary review of the case in this Court. Nor could it be seriously contended that the Government's antitrust litigation program, or "the effective enforcement of the antitrust laws", turns on this Court's settling the true import of so special a clause as par. 18.

The District Court's expressed reservations of jurisdiction, through pars. 18 and 23 of the 1953 decree, neither enlarged nor limited its own power to modify its decree. The equity powers of the United States courts with respect to modifying their decrees are the same whether or not

reservations of this kind are expressed. As Mr. Justice Cardozo remarked in the *Swift* case 286 US at 114,

> "If the reservation had been omitted, power there still would be by force of principles inherent in the jurisdiction of the chancery."

The further reach of the Government's claim to modify the rule of the *Swift* case threatens serious unsettlement of the antitrust law. The market circumstances upon which adjudications are entered do not remain static thereafter. Evolution is continuous, conditions are bound to change. Yet the thrust of the Government's contention is that it at least, if not a private party, should be at liberty to re-open a decree entered after no matter how long a trial, upon proof of changed conditions that falls far short of the *Swift* standard of unforeseen and grievous effects. Under such a rule, litigation would never have an end. Such an outcome cannot be in the interest of justice or orderly antitrust administration. It would subvert the very purpose of the Expediting Act.

Conclusion

The appeal should be dismissed. Alternatively the District Court's order of April 11 1967 should be affirmed.

Respectfully submitted,

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